Supreme Court, U.S.
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No. 02-1151

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IN THE

Supreme Court of the United States

CAROLYN A. ("HOWERTER") LA FAVRE, AND JAMES SCOTT MERRITT, JR., ON BEHALF OF THEMSELVES AND ALL SINGLE KANSAS INCOME TAX PAYERS,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE, A KANSAS AGENCY, TIM SHALLENBURGER, AS STATE TREASURER OF KANSAS, STEPHEN S. RICHARDS, SECRETARY OF REVENUE OF THE KANSAS DEPARTMENT OF REVENUE, JEFFREY LOCHOW, DIRECTOR OF DIVISION OF TAXATION OF THE KANSAS DEPARTMENT OF REVENUE, AND DAVID J. HEINEMANN, AS AGENT AND DESIGNEE OF SECRETARY OF REVENUE AND OF DIRECTOR AND DIVISION OF TAXATION OF KANSAS DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners invoked the original jurisdiction of the Supreme Court of Kansas, asserting the federal constitutional claim that there is a fundamental right of United States citizens "to be and remain single," *inherent* in the citizens via the "liberty interest" secured by the First and Fourteenth Amendments, and that exercise of such right was penalized by unique surtax levies imposed on *all unmarried individuals*, under Kansas' one-off "income tax" regime for 1988-1997. By resort to one proceeding against officials in mandamus, petitioners (i) mounted a facial challenge to the levying statutes, (ii) asked the court to strike the penalty elements built into the statutory rates, and (iii) sought an order to respondents for ministerial refund or credit redress for all "deprived" single citizens.

The questions presented here are:

1. Whether under the Fourteenth Amendment and doctrine expounded by this court in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), and *Richards v. Jefferson County*, 517 U.S. 793 (1996) (involving citizens' access to court), the Supreme Court of Kansas denied procedural and remedial due process to petitioners and to the mass of Kansas single taxpayers, *by rejecting without opinion their petition for mandamus*, thus defaulting any holding for review in this court as to the substantive federal constitutional claims asserted by petitioners (that their fundamental right was surtaxed), and by defaulting any address to constitutional due process standards, as expounded in *Reich v. Collins*, 513 U.S. 106 (1994), applicable to any preclusive state law doctrine.

2. Whether there is an inherent fundamental right to be and remain single which was penalized by Kansas' unique surtax levies on all single persons during 1988-1997.

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PETITION FOR CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the final judgment of the Supreme Court of Kansas in this case, which terminated their proceeding below.

OPINIONS BELOW

There were no opinions. Petitioners raised their federal claims in a Petition for Writ of Mandamus and Order for Reassessment ("petition for mandamus"), Appendix ("Pet. App.") D, 14a - 54a. The Supreme Court of Kansas issued a two-sentence "denial," Pet. App. A, 1a - 2a, which is unpublished. That court's two-sentence "denial" of petitioners' later motion for rehearing, Pet. App. B, 3a - 4a, is also unpublished.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Kansas denied petitioners' petition for mandamus on March 20, 2002. That court denied petitioners' motion for rehearing on April 25, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment, Kansas Constitution Art. 3, § 3, Kansas Bill of Rights § 3, Kansas Statutes Annotated ("K.S.A.") § 60-801, K.S.A. § 79-32,105(a)-(c), 42 U.S.C. § 1983, and relevant parts of laws amending the levying sections of K.S.A. § 79-32,110 (during 1988-97), are reprinted in Appendix C, Pet. App. 5a - 13a.

STATEMENT OF THE CASE

I. Federal Questions Raised In The Pleadings Below

Petitioners' federal constitutional claims were raised in their pleadings, as in *General Oil Co. v. Crain*, 209 U.S. 211, 212-216 (1908). They sought relief against respondents in mandamus and claimed that the unique rate structure imposed in Kansas income tax statutes systematically surtaxed (and thereby "penalized") *all* single persons in the exercise of their fundamental right to be and remain single (1988-1997). They sought ministerial refunds or allowance of forward credits

(to all Kansas single taxpayers) for their overpayments. The orders below merely dismissed and "noted" the pleadings in two sentences. The court did not address any "federal questions;" it terminated the proceeding. Petitioners' original Petition for Writ of Mandamus and Order for Reassessment ("petition for mandamus") appears in Appendix D, Pet. App. 14a - 54a; their accompanying Memorandum of Points and Authorities (required by Kansas rule) appears in Appendix E, Pet. App. 55a - 63a; their Motion for Rehearing appears in Appendix F, Pet. App. 64a - 75a.

Petitioners pled their constitutional claims and raised their federal questions below, according to the following two theorems:

(1) Where X= valid state statutory tax rates, and Y = a known citizen with a fixed dollar tax base (viz., Jane Doe and her "Kansas taxable income" for 1996) then:

X% × Y$ = "the right tax."

A statutory X may not penalize a group of Ys for simply exercising an inherent citizen-based fundamental right. In this case the judicial problem is adjudicating the facial constitutional validity of X. The problem for afflicted Ys is to find a court which will accord due process and hear their claims about X.

(2) If X is held infirm, and is thereupon judicially modified or "saved" into a valid percentage, then due process mandates that all the Ys who overpaid be accorded meaningful access to refunds or credits (and courts).

In this case, all the relevant Ys have already filed a return with respondents, disclosing their fixed dollar tax base. If X is held infirm, remediation of the Ys is a ministerial task. *The problem is not whether each and every Y is a deserving citizen.* State administrative remedial doctrine developed for cases involving a few Ys (who might seek to change their own taxable income numbers) is not compatible with meaningful due process remedies, where 400,000 - 500,000 citizens assail X.

II. Proceedings Below

Petitioners (on behalf of themselves and all single persons surtaxed by Kansas) on February 6, 2002 brought federal constitutional claims in their petition for writ of mandamus in the Supreme Court of Kansas, invoking that court's original jurisdiction under Kansas Constitution, Art. 3 § 3 and K.S.A. § 60-801, claiming their own rights to an adjudication and an order against respondents for official redress under the due process clause of the Fourteenth Amendment. Pet. App. D, 19a - 22a, *passim*. Petitioners also filed a Memorandum of Points and Authorities showing that mandamus is appropriate in Kansas where citizens raise a public question of fundamental constitutional rights, challenging a statute on its face, and seeking governmental ministerial relief, per Kansas Supreme Court Rule 9.01(b). Pet. App. E, 55a - 63a. K.S.A. § 79-32, 105(c) imposes the ministerial duty on respondents to refund or credit Kansas income tax overpayments *shown by any individual taxpayers' returns*. Pet. App. 7a - 8a.

Petitioners maintained that single persons who filed Kansas income tax returns and paid income taxes for any of the years 1988-1997 have a common fundamental right (to be and remain single) and the same chose in action for restitution of the unconstitutional statutory penalty elements.[1] Petitioners sought

1. *Lunding v. New York Tax Appeals Trib.*, 522 U.S. 287 (1998), illustrates a remedial problem petitioners seek to solve here. Mr. Lunding had taken his own case up the New York administrative and appellate system, pursuing various arguments. The right argument was that Lunding had a right to live in Connecticut and work in New York, protected under the privileges and immunities clause. New York was invalidly "surtaxing" his alimony (by denying an adjustment to New York source taxable income for alimony paid, but only as to non-residents), which smacked of a "penalty" per Justice O'Connor. But Mr. Lunding's claims below were not launched in such manner that all similarly "surtaxed" non-resident New York taxpayers could in fact benefit from a direct judicial order to officials (on remand below) to remediate each and every one. Other non-party New York non-resident returns (as filed) would not necessarily have disclosed the allowable alimony deduction in dollars. (Cont'd)

a judicial tribunal which could order the respondents to do their statutory duty as to income tax overpayments, and to allow forward credits or refunds to all afflicted single persons. *Richards v. Jefferson County*, 517 U.S. 793 (1996), seemed clear enough that they are entitled to make their own argument.

The petition was denied without opinion on March 20, 2002. Petitioners filed a motion for rehearing on April 8, 2002, Pet. App. F, 64a - 75a. They specifically entreated the Supreme Court of Kansas not to ignore the due process jurisprudence of the United States Supreme Court in this area, to hear their substantive federal constitutional claims, and to consider and fairly adjudicate the federal due process implications of any plea in bar respondents might assert. *Ibid.*, 65a, 67a, 68a, 69a - 74a. On April 25, 2002, petitioners' motion for rehearing was denied without opinion.

Under Kansas Supreme Court Rule 9.01(a), that court can transfer a controversy to a Kansas district court for "adequate relief." However, any mass relief from a trial court is foreclosed in this case. Kansas splits the matters of (i) adjudication on the constitutional merits of a given taxpayer's claim, completely away from (ii) any judicial capacity to order effective group-wide refund redress on identical claims. *Zarda v. Kansas*, 250

(Cont'd)

Remedies to all were not ". . . embraced in a single action." Cf., *The City of Chicago v. Dows*, 78 U.S. (11 Wall) 108, 112, 20 L. Ed. 65, 67 (1871).

In contrast, petitioners here sought an order in mandamus which would operate directly upon the official respondents, who in this case could easily redetermine overpayments from the returns already filed by single persons, which order would thus remediate *all* afflicted single taxpayers, once the "saved" or "correct" Kansas income tax *rates* were judicially determined. This case implicates no necessity of redetermining anyone's discrete dollar items of income or deductions, taxpayer by taxpayer. The Kansas statutory penalty rates can only be purged by the judiciary. K.S.A. § 79-3239. Then the respondent officials should do their duty. *Board of Liquidation v. McComb*, 92 U.S. (2 Otto) 531, 541, 23 L. Ed. 623, 628 (1876).

Kan. 364, 826 P.2d 1365 (Kan. 1992); *Dean v. Kansas*, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992); *Farmers Banshares of Abilene v. Graves*, 250 Kan. 520, 826 P. 2d 1363 (Kan. 1992). In the foregoing cases, the problem was systematic administrative misfeasance (involving mass overcollections of motor vehicle and bank franchise taxes) practiced on Kansas taxpayers statewide, which raised constitutional arguments. Yet taxpayers got no holding on the merits, much less "class" relief. Under regnant doctrine of the Supreme Court of Kansas, statutory "review of administrative action" must be pursued by each overassessed taxpayer, as the *sine qua non* of ever getting a refund. The mass of taxpayers, who hadn't pursued administrative "claims," were not "before the court." *If the taxpayers weren't "before the court" they couldn't get their money back. There could be no "class;" therefore, no adjudication. Kansas kept the money.*[2]

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2. State fiscs will thrive on unconstitutional collections if administrative "claims multiplicity" defeats actual judicial orders for refunds to all afflicted citizens. Petitioners here are not "well financed corporations." They claim a common fundamental right to be and remain single, but could never afford to prosecute individualized refund claims.

In *Patterson, Com'r. v. Gladwin Corp., et al.*, 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), the Supreme Court of Alabama has read the Alabama Taxpayer Bill of Rights and Uniform Revenue Procedure Act to provide the *exclusive* remedial path for actual refunds of past franchise taxes imposed on all foreign corporations, which were held unconstitutional by this court in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999). The Alabama remedial regime has become similar to that in Kansas, demanding administrative claims multiplicity, strictly according to positive statute law, for actual refunds, taxpayer by taxpayer. The *stare decisis* effect of *South Central Bell Tel. Co.* is of no import if each corporation has not filed a separate "claim." Yet petitioners understand that no one (claimants, ignorant small corporations, officials, or courts) actually knows what the *right (or "saved") franchise tax base or franchise tax levying rates actually were* for several thousand afflicted foreign corporations. The actual parties in *South Central Bell Tel. Co. v. Alabama*,

(Cont'd)

Petitioners sought to get *respondents* "before a court," and to get a "final judgment of the court," as to their federal claims. K.S.A. § 79-32,105(c) renders respondents subservient to the original jurisdiction of the Supreme Court of Kansas granted in Art. 3, § 3 of the Kansas Constitution, in mandamus. K.S.A. § 60-801, Pet. App. 6a, explains that mandamus runs to officials, whose duty results "by operation of law."

The Kansas Bill of Rights § 3 (conferring a Kansas right "to petition the government, or any department thereof"), and the Kansas Constitution, Art. 3, § 3, read together, led to the conclusion that the Supreme Court of Kansas is the tribunal to hear these citizen claims. Pet. App. 5a - 6a. The problem of subject matter limitations on "original" versus "appellate" jurisdiction, addressed by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was definitively solved by Kansas in 1861, via Art. 3, § 3 (conferring "original jurisdiction . . . in mandamus"). Compare, Pfander, James E., *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L.R. 1515 (2001). Indeed, reading 42 U.S.C. § 1983 in both a declaratory and a federal rights granting sense, mandamus issuing from a state supreme court to vindicate individual fundamental rights against officials would be the "suit in equity," or *the* "proper proceeding for redress," where state positive law and explicit remedial doctrine

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(Cont'd)

supra, have settled their differences with Alabama privately. There is no common cause to change the actual corporate financial information already filed in any particular franchise tax return. The Alabama judiciary has not described any definitive means of computing "the right franchise tax" or an actual refund for any foreign corporation, at present. Two corporate taxpayers sought to bring a "class action" in a trial court on behalf of all similarly situated, to determine the "right franchise tax" and for group relief, but such is now held impossible. The common problem in *Patterson, Com'r. v. Gladwin Corp.*, *supra*, and the instant case is that piecemeal procedure under multiplicitous state remedial systems will not provide meaningful relief for a mass levy under an unconstitutional law.

seem to fail. Pet. App. 24a; *ibid*, 38a. Petitioners read *Kittredge v. Boyd*, 136 Kan. 691, 18 P.2d 563 (Kan. 1933), as a classic example of mandamus, in a case requiring restitution of an unconstitutional Kansas tax (also announcing the Kansas rule that any legislative attempt to appropriate constitutionally tainted money would be void). Petitioners claimed that Art. 3, § 3 of the Kansas Constitution does not wither away in the face of "administrative law." Petition for mandamus, ¶¶ 1.D - 1.G, Pet. App. 16a - 18a; *ibid*, ¶¶ 3.A - 7.D, Pet. App. 19a - 24a. Petitioners did not complain of administrative decisions during the collection of the levies.

Petitioners challenged the levying statutes themselves, which were emitted from the Kansas legislature, on their face. *Board of Liquidation v. McComb*, 92 U.S. (2 Otto) 531, 541, 23 L. Ed. 623, 628 (1876) (mandamus and injunction are somewhat related; officials may not rely on unconstitutional statute). A common sense approach to other statutory procedure was urged. *Cf.*, *Ogden City v. Armstrong*, 168 U.S. 224, 237-241 (1897) ("Where the tax was wholly void and illegal, as in this case, the statute and its remedies for error and irregularities have no application"). Petitioners asserted that due process principles involving citizen access to court and remediation, "in this case," require a means of plenary adjudication and meaningful mass remediation for all afflicted citizens. The case by case state system would not work. *United States v. Osage County (Okla.)*, 251 U.S. 128, 132-4 (1919) (where the state and counties systematically destroyed the federal rights of the class, equity would interpose against the officials); *Ward v. Love County (Okla.)*, 253 U.S. 17, 22-24 (1920) (which in effect ruled that constitutionally tainted tax money equitably reverted to all the payors, regardless of the state system).

Other state courts have agreed. *Javor v. State Bd. Equalization*, 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153 (Cal. 1974); *Santa Barbara Optical Co. v. State Bd. Equalization*, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (Cal. App. 1975); *Ware v. Idaho State Tax Com.*, 98 *Id.* 477,

567 P.2d 423 (*Id.* 1977). Unjust enrichment of government is explicit in these cases; the official defendants already knew who the "deprived" persons were. They had paid over their own money pursuant to a systematic governmental collection system, but the relevant money should never have been collected. The defendants were retaining it; the citizens (all of them) wanted it back. *Defendants' own records told most of the tale in each instance.* X was valid enough, but had been misapplied to a group of Ys already known.

The unconstitutional result may be termed as "unjust governmental enrichment" (for state law purposes), or as a mass citizen "deprivation" (if a fundamental right is surtaxed under the XIVth), or a bright ruddy "taking" (where the state collects constitutionally tainted money, provides no viable remedy, and will not compensate or restitute). *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Breyer, J.) (the "due process" clause and takings clause are "neighbors"); *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 36 (1990) ("... exaction of a tax constitutes a deprivation of property. ..."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 11 L. Ed. 576 (1845) (Story, J. and McLean, J., each dissenting as to disremediation of taxpayer by new federal statute). So petitioners claimed in ¶ 10 of their petition for mandamus, and elsewhere. *Viz.*, Pet. App. 27a - 28a, 37a - 38a.

* * *

III. Petitioners' Substantive Claims

A. The Fundamental Right to Marry, or Not Marry

If there is a fundamental right to marry, petitioners claimed that there is an antecedent (or corollary) volitional right not to marry. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Part II). It is a matter of "liberty" (via religious choice, or secular Blackstonian "freewill").

Petitioners claimed that the systematic penalty elements of the statutory rates levied under K.S.A. § 79-32,110 (1988-1997), amounting to *an explicit mathematical surtax on all single persons*, were facially unconstitutional under due process

principles and this court's doctrine of "hostile state invasion" of fundamental citizens' rights. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."); *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936). Petitioners also asserted that a state may not impute or create extra income chargeable to a taxable citizen, based merely on his marital status. *Hoeper v. Tax Comm. (Wisc.)*, 284 U.S. 206 (1931).

B. Related Matters of Kansas Power

The petition for mandamus, ¶ 1.A-B, Pet. App. 15a - 16a, sought to focus on the matter of lack of sovereign power. There is no principle of Kansas common law which says that a femme sole earning $10,000 per year is richer (or more iniquitous) than a married couple aggregating $20,000 per year. There is no common law recognition that Kansas has prerogative to say anything in particular about the liberty interest of femmes soles or single people in general. Sovereign regulatory or common law husband-power over wives could not be a viable argument to expand Kansas' power over single people. Since 1861, married women have a separate estate in their own property. Kansas Constitution, Art. 15, § 6. The filing of joint income tax returns has always been elective.

Petitioners asserted in Count I of their petition for mandamus, Pet. App. 30a - 34a, that under Kansas own "single subject rule," Kansas Constitution Art. 2 § 16, the relevant levying bills were void *ab initio* since they improperly combined state revenue raising measures (viz., the imposition of taxes on the income of "individuals" for general use) with a levy putatively based on a notional state police or regulatory power. *Panhandle Eastern Pipeline Co. v. Fadely*, 183 Kan. 803, 332 P. 2d 568 (Kan. 1958). Regulatory power over marriage (if it extended to licensing single people to choose to be single people), under Kansas' own constitutional doctrine, could not have been exerted in combination with a general revenue raising (income taxing) bill. *Kansas ex rel. Moore v. Wichita*, 184 Kan.

196, 335 P.2d 786 (Kan. 1959). It would be "deceptive" to the voting legislators and the public. Art. 11, § 5 of the Kansas Constitution reinforces the foregoing rule, with the corollary that a tax law shall "distinctly state the object of the same. . . ."

There is also a Kansas tradition, posited in *Wheeler v. Weightman*, 96 Kan. 50, 67, 149 P. 977, 984 (Kan. 1915), ". . . in which the courts have refused to stultify themselves respecting the true character of legislation and have pierced through speciousness to reality. . . ." (so-called "registration fee" was an invalid tax). A graphic example is *State v. Kelly*, 71 Kan. 811, 81 P. 450 (Kan. 1905), in which the court declined to sanction a "deceptive" piece of legislation.

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IV. Remedies

It is the duty of respondents to correct the past Kansas income tax overassessments and issue refunds or forward credits (to succeeding taxable years) *to the account of all single citizens who were invalidly surtaxed, equal to the amounts overpaid,* based on their Kansas income tax returns (already filed). Respondents are charged with such ministerial responsibility under K.S.A. § 79-32,105(c):

> If the director discovers *from the examination of the return*, or upon claim duly filed by the taxpayer *or upon final judgment of the court* that the income tax, withholding tax, declaration of estimated tax or any penalty or interest paid by *or credited to any taxpayer* is in excess of the amount legally due, the director shall certify to the director of accounts and reports the name of the taxpayer, *the amount of refund* and such other information as the director may require. Upon receipt of such certification the director of accounts and reports shall issue a warrant on the state treasurer for the payment to the taxpayer out of the fund provided in subsection (b), except that no refund shall be made for a sum less than $5, but such amount may be claimed by the taxpayer as a credit against the taxpayer's tax liability in the

> taxpayer's next succeeding taxable year. [italics supplied]

There is no requirement that all citizens be "before a court," or that any overpaid taxpayer make any special post-return remonstrance to the Kansas Department of Revenue. No separate post-return administrative refund claim would affect the citizen-specific numerical information already filed in the Kansas income tax returns of each of the affected single taxpayers. No recomputations of anyone's "Kansas taxable income" are required. The annual returns already filed by the citizens (Kansas income tax forms K-40) disclose (i) who the single taxpayers were, (ii) that they were single, and (iii) what their "Kansas taxable income" was. No system of annual individual income tax collection, aided by employee withholding every payday, and quarterly estimated payments, providing multi-year accountings (annual debits for taxes and forward credits for annual overpayments), *would work*[3] if each citizen had to go to

3. If ministerial examination of a return reveals an overpayment, the return speaks for itself, *as* a refund claim. Likewise, if the tax shown by the return is not timely paid by the taxpayer, officials don't have to sue him to collect. K.S.A. § 79-3235. Employer withholding of income taxes in Kansas eliminates any notion of a volitional element at the time of payment by wage earners (such as petitioner LaFavre). K.S.A. § 79-3296. Self-employed persons seem initially to have greater latitude towards a self-help pre-deprivation remedy (by not paying some of the tax), but as petitioner Merritt discovered, as to his taxable year 1996, a bond equal to 125% of the amount sought to be collected by a Kansas agency ordinarily must be posted for a citizen to secure judicial review of agency action. K.S.A. § 74-2426(d). When respondents asserted a 1996 deficiency, Merritt protested and got a hearing within respondent Kansas Department of Revenue. He found out that respondents think there is no fundamental right to be single and that *Peden*, *infra*, just fixed everything, as of November 6, 1998. Assuming he would lose in further "review" proceedings before the Kansas Board of Tax Appeals, he noticed the bonding requirement for access to the Kansas Court of Appeals (§ 74-2426(d)), and left it alone. By warrant and distraint under K.S.A. § 79-3235, Kansas collected its deficiency for 1996, in January of 1999. Merritt then filed a post-levy "refund claim" for 1996, which resides with respondents, with his claims for 1988-95.

law to get his accounts right, or to get refunds for clear overpayments. K.S.A. § 79-32,100(d); § 79-32,104. Likewise, if officials had to do the same for clear deficiencies.

In their petition for mandamus, ¶ 20, Pet. App. 36a - 37a, petitioners urged that the appropriate "found" or "severed" or saved rates of Kansas income tax chargeable to single persons are the same rates imposed on married persons (1988-1997), to be levied at the respective bracketed levels of Kansas taxable income applicable to joint returns of married persons, divided by two. Such were the mathematics built into the Kansas joint return system, imposed for the best part of four decades ending in 1987. The Kansas legislature abandoned the challenged 1988 regime and has reimposed income taxes under this original mathematical system, from 1998 to the present. 1998 Session Laws of Kansas, Ch. 130, Sec. 19; K.S.A. § 79-32, 110. A single person who derived $10,000 in annual Kansas taxable income (net of deductions and allowances, etc.), during each year of the regime, was "surtaxed" $840 during the ten years of the regime (without interest).

Rote application of administrative law to several hundred thousand Kansans would involve an adversarial process (yet no fact finding or "as applied" interpretation), on a case by case basis[4], on identical claims. Pet. App. E, 57a - 58a. Yet the

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4. Thus, imagine an administrative claims initiation process, mandated for hundreds of thousands of citizens. Nobody exactly knows the right tax rates. One by one, each "claimant": (i) stands on the exact numerical information already filed in her Kansas income tax return, (ii) claims either a God-given right (*viz.*, quoting the advice of St. Paul in I Corinthians 7-9) under the "free exercise" clause of the First Amendment, or a sui generis and inherent "liberty interest" right (protected by secular Blackstonian notions of inherent individual freewill and choice via the due process clause of the XIVth), simply to be and remain single, and thereupon is told (iii) that Kansas revenue officials have found no fundamental right to be and remain single in the Constitution, and that (iv) *Peden v. Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), *cert. den.*, 520 U.S. 1229 (1997) (a low-scrutiny "rational basis" affair, decided solely upon lenient "equal protection" principles), (Cont'd)

ministerial refund statute speaks to the return of *any* taxpayer. Ministers cannot proceed without a judicial order stating what the valid "severed" or "saved" levying rates were; that determination is purely a judicial function. K.S.A. § 79-3239; K.S.A. § 79-32,108. That was another public question. Appendix E, Pet. App. 58a - 61a. *Cf.*, *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 551-2 (1937).

Redress in this case would be a matter of dollar for dollar restitution of illicit collections measured by the void penalty elements mathematically built into the statutory rate structure[5]. Petitioners believe about 400,000-500,000 single persons are actually involved. The chairperson of the Kansas Senate Assessment and Taxation Committee announced that the average income for single Kansans was $19,000, on February 4, 1997. *Kansas City Star, Metropolitan Section*, February 5, 1997 (distributed in Johnson County, Kansas at large). It was contemporaneously announced that there were 500,000 single Kansas taxpayers and that a "repeal" of the surtax regime in

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(Cont'd)
has shut down her claims. This happened to petitioner Merritt as to 1996; hearings were never even scheduled for his 1988-1995 administrative claims.

5. In *Jackson Co. (Kansas) v. United States*, 308 U.S. 343 (1939), this court held that where the appropriate restitutional remedy was based on due process, treaty, and Fifth Amendment principles, not the Kansas administrative scheme, no interest at local Kansas statutory rates was required. The aggrieved property owner got back *all* the unconstitutionally mulcted money. Local procedure didn't apply. The Tenth Circuit had held that she had not sat on her rights, and local limitations on the local administrative remedy were no valid plea in bar. *Jackson Co. (Kansas) v. United States*, 100 F.2d 929 (10th Cir. 1939), modified as to interest, *supra*. In a case of classic interlocking governmental blunders, actually resolved by principles of unjust enrichment, where there was no available state remedy, see *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 723-25 (1998) (Souter, O'Connor, J.J., concurring specially, as to remand for findings on pre-1983 partial disgorgement). For the end of a long struggle for redress in mandamus, *see Duke v. Turner*, 204 U.S. 623 (1907).

stages, proposed in 1997, would save those taxpayers $41.5 million, per year, when the surtax was finally eliminated. *Ibid.*

* * *

V. Background of the Levies and a Prior Failed Challenge

In 1988, Kansas for the first time installed a set of separate income tax rates, directed solely at single persons, which were legislatively fixed at higher percentages than the rates set for married persons, up and down the graduated income scale. No percentage rate fixed on single persons could be found in the separate Kansas levying statutes directed at married persons. Pet. App. 8a - 9a.

Kansas had never purported to exert any coercive power over the choice of single people as to whether and when to marry. No pari materia evidence exists which would evince any public-minded decision of the 1988 Kansas legislature to imagine or exert any such coercive power. As to marriage, in 1980 and 1990, starting at age 45 and up, there were more Kansas single women than men. Starting at age 55, on up, in 1990, there were 3.28 unmarried women for each single man in Kansas according to the U.S. Census. No sovereign power on earth could have married all of them, by classifying and penalizing according to positive statute law. Originally (in 1933) Kansas (like other jurisdictions) did not even allow joint returns. It taxed individual "taxable income." The point was to raise revenue, not regulate households or lifestyles. Kansas Constitution, Art. 11, § 2. If Kansas had a different "object" in 1988, it never said so. Art. 11, § 5, *ibid.*, would have constrained it to say so.

On April 14, 1993 Eric Peden and Sharon L. Smith challenged the regime in a Kansas district court, raising only a rational basis equal protection claim. But they seemed to come out as winners by late 1995. The trial judge declared the top bracket rates (only those) levied on single taxpayers to be invalid, for lack of a "rational basis." He did not address the entire statutory rate structure levied on all single taxpayers, at all levels of taxable income. Such of the single masses as became aware of the matter were hopeful in 1996; a few filed administrative

refund claims of their own, but most did not. Petitioner LaFavre and many others did not, based on plausible advice as to individual expense. Experience showed that a remedy would come later, as in the prior hard fought episode of the Kansas military retirees, where the legislature[6] had to step in to provide the remedy. K.S.A § 79-32,193. Not that anyone (laymen or lawyers) really knew exactly what to do. *The trial judge had not said what the correct or "saved" tax rates actually were.* Even as to the more prosperous citizens, there was no judicial clue given, as to valid "saved" rates on their top (or lower) bracket levels of income. Nor had the trial judge entered any generalized order as to redress, or depicted any procedure therefor.[7] In 1996 the respondents took an interlocutory appeal to the Kansas Supreme Court.

During 1996, the administrative refund claimants (post-return) received a notice that their claims were denied and that respondents' "judgment" would stand, unless they protested further. Those who protested the "denial" of their "claims" and requested administrative "hearings" (including petitioner

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6. In Kansas, K.S.A. § 79-32,105(b) provides $4,000,000 for ordinary income tax refunds, but that is not enough for 400,000 single people in this case and never was. A staggered reduction of the surtaxes initiated by Kansas in 1997 and the full repeal of the surtax system in 1998 were both enacted on the basis of numbers published by the Kansas legislature indicating lump sum revenue decrements in excess of $30 million, per annum. Those laws affected only the Kansas rate structure, repealing the penalty elements, and taxed single persons under the same rates as married persons. *Cf.*, Kansas Legislature, 1997 Summary of Legislation, Legislative Research Dept. (June, 1997), pp. 104, 138-139; Kansas Legislature, 1998 Summary of Legislation, Legislative Research Dept. (June, 1998), pp. 152, 156. At the end of the administrative line, the $4,000,000 legislative redress fund (administered by respondents) was at all times insufficient to provide restitution for even one taxable year. Petition for mandamus, ¶¶ 1.E, 9, Pet. App. D, 17a, 25a - 26a; Memorandum of Point and Authorities, Pet. App. E, 62a; Motion for Rehearing, Pet. App. F, 68a - 69a, 70a.

7. The trial court merely declared that there was a "class" of top bracket single taxpayers.

Merritt, who filed homemade "claims" for 1988-1995), were then notified by the Kansas Department of Revenue in a form letter captioned "Order Holding Appeal in Abeyance," that (i) Mr. Peden's case on appeal would decide everything, (ii) their post-return claims were put on administrative hold (in "abeyance"), and (iii) they were "bound" until further orders. Respondents (who are not part of any judiciary) falsely represented they had authority to "bind" the claiming citizens, *in personam*, which is believable only to a layman.[8] *Hansberry v. Lee*, 311 U.S. 32 (1940). Petition for mandamus, ¶ 39, Pet. App. 46; *ibid.*; ¶¶ 24-25; Pet. App. 38a - 41a.

On December 20, 1996, the regime was sustained by the Kansas Supreme Court, solely on "rational basis" equal protection analysis; the trial court was reversed. *Peden v. Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), *cert. den.*, 520 U.S. 1229 (1997) ("*Peden*"). Marriage is a good thing for people. Since the "benefits of marriage never end," the top bracket surtax levy on single persons (for example, 7.75% ÷ 6.45% = 20.16% "surtax") could never end as long as a citizen remained single. Addressing the unique statutory rate structure, the Kansas Supreme Court allowed that the top bracket rate difference (only 1.3% since 1992) was not so much. Congress "classifies" married people and single people all the time, differently. Therefore Kansas single persons can be classified "differently." The legislature *might* have wished to *encourage* marriage, based on sociology proffered by the Kansas Department of Revenue. Justice Breyer's recent pronouncement, *Watchtower Bible and Tract Soc. of N.Y., Inc. v. Village of Stratton*, No. 00-1737, __

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8. However, their representations were taken seriously and deterred the further filing or prosecution of post-return claims by accountants. Competent tax accountants inform petitioners that once they heard of respondents' Order, expense factors led them to advise their clients simply to watch and wait. Pursuit of separate claims via hourly-paid counsel would not have been a paying proposition to the average claimant. As a practical matter of public relations, respondents got results with their Order. Nobody besides Mr. Peden has gotten a day in court.

U.S. __ (June 17, 2002), that ". . . we expect a government to give its real reasons for passing an ordinance[,]" was not an obstacle.

Opposing the petition for certiorari filed here, Kansas opened its Brief with a statement to this court that it had "repealed" the statutes. Respondents' Brief in Opposition, *Peden v. Kansas*, S. Ct. Case No. 96-1459, p.1. Thus, *no problem for the future*. *Id.*, pp. 8, 17. In fact Kansas stayed with the surtax system for 1997 (viz., top bracket single persons paid a rate of 7.75%, versus 6.45%, tops, for married persons, a "surtax" of 20.16%). The 1997 law actually depicted only a schedule of rates phasing out the surtax by the year 2000. 1997 Session Laws of Kansas, Ch. 41, Sec. 13 (signed by the Governor on April 4, 1997, just in time to oppose Mr. Peden's petition here). As to the surtax levied for 1997, *see* Pet. App. 12a - 13a. Kansas did not quit levying the surtax until 1998. 1998 Session Laws of Kansas, Ch. 130, Sec. 19.

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These petitioners raise the following unremediated problems for the future: (1) Each single citizen has a running account with respondents, which should be credited by reversing the unconstitutional debits exacted by Kansas, to the extent of the penalty elements of the challenged levies. K.S.A. § 79-32,100(d); § 79-32,104 (2) Mr. Peden was making the wrong argument (3) No citizens are in fact "bound" by any aspect of *Peden* (4) The citizens, being told that the law was "let stand" by respondents, don't know the difference between the folklore of low scrutiny "equal protection" applied *Peden*-style, and a systematic penalty on fundamental rights.

Kansas officaldom will not tell them. Indeed, in the aftermath of *Peden*, and on the eve of the legislative session which produced the actual repeal of the surtax system (in 1998) the Governor of Kansas expounded in the print media that "The fact that single Kansans were paying higher rates was all quite tidy and legal, but many of us had some serious questions about the basic fairness of such a prospect." *The Sun*

Newspapers, Johnson County, Kansas (December 31, 1997), 4A. Within Topeka officialdom, no one's public doubts have extended to the "punitory" effect of the surtax, or to the due process clause or any single persons' fundamental "liberty" interest. After petitioner Merritt filed his post-levy 1996 claim in 1999, he got another "denial" from respondents (to place alongside 1988-1995), with copies of national press reports that *Peden* was "let stand." Respondents further admonished that Merritt could read the opinions of the courts; so he has.

* * *

After denial of certiorari on their "equal protection" matter, the *Peden* plaintiffs were dismissed by the trial court. There was no settlement, no benefit to single taxpayers, no mass global preclusive decree, no notice to citizens at large (re any settlement or opt-outs or identity of the parties, or interventions or res judicata bars or fundamental rights claims or days in court). The *Peden* court had taken the trouble, before it handled the merits, to announce to the public that only 5000 claimants were involved, just a few top bracket folks. The trial court had certified a "class" for purposes of the interlocutory appeal (after first refusing), but actually any statewide or "class tax refunds" were procedurally doomed, since the masses weren't "before the court." *Dean v. Kansas*, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992); *Zarda v. Kansas*, 250 Kan. 364, 826 P. 2d 1365 (Kan. 1992); *Farmers Banshares of Abilene v. Graves*, 250 Kan. 520, 826 P.2d 1363 (Kan. 1992). All the participants in *Peden* had to know it.

On April 15, 1999, these petitioners filed a complaint in the United States District Court for the District of Kansas, challenging the statutory rates. They sought a chancellor. That court dismissed under the XIth Amendment against *all* defendants "for lack of subject matter jurisdiction," likening the whole affair to a retrospective tort claim, without address to the merits, 28 U.S.C. § 1341, or other preclusive doctrine urged by respondents. The United States Court of Appeals for the 10th Circuit likewise affirmed solely for lack of jurisdiction,

on grounds of federalism and the Eleventh Amendment. On appeal, respondents remonstrated that they handle lots of state refund claims all the time (as depicted in *Newsweek, Inc. v. Florida Dept. Rev.*, 522 U.S. 442 (1998) and *Reich v. Collins*, 513 U.S. 106 (1994)), and that *Peden* was in fact a "class action." In the end, the panel was unwilling to see any difference between the ministerial reassessment and forward credits sought by petitioners, and a retrospective adjudication of money liability. This court denied certiorari, *LaFavre, et al. v. Kansas, et al.*, No. 01-624, 534 U.S. 1080, on January 7, 2002. Petitioners commenced their efforts below. Petition for mandamus, ¶ 1.G, Pet App. 18a, *passim*.

REASONS FOR GRANTING THE WRIT

I. This Court Should Decide Whether in the Case of a Statewide Statutory Levy Challenged by Citizens as Void on its Face Under the Fourteenth Amendment, Their Due Process Rights of Access to Court Actually Encompass a Right to Seek Judicial Remediation in Favor of All Afflicted Citizens Against Responsible Officials, "in a Single Action."

Petitioners followed their first constitutional theorem, that X × Y produces a constitutional tax. They challenged X, and sought mass redress. If the citizen Ys can't get to court in one proceeding, their common constitutional chose in action about X is depreciated. Ante, p. 2. The contrary state theorem is that rigid insistence on a multiplicitous refund system is good business. The fact of state collection of a tainted levy *en masse* will become 11/10 of the Constitution. The importance of a citizen test to the state theorem cannot be overstated.

The initial vice below was that petitioners' access to court was thwarted by the selfsame court that has organic original jurisdiction of petitioners' federal substantive constitutional claims. The orders below deny due process, and conflict with *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (Missouri wrongly rejected "bill in equity"), and *General Oil Co. v. Crain*, 209 U.S. 211 (1908). *See also Logan v.*

Zimmerman Brush Co., 455 U.S. 422 (1982), where officials and the Illinois Supreme Court thwarted the claimant right out of a remedy.

Below, these petitioners sued the right respondents, whose duties *are* to provide redress, in the only court having original jurisdiction. Compare, *Christopher v. Harbury*, No. 01-394, __ U.S. __ (June 20, 2002), Part III. They brought citizens' claims "in a single action." Mandamus and the due process clause were invented for just this, thought petitioners. *Board of Liquidation v. McComb, supra*; *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Pfander, James E., *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L.R. 1515, 1523-35, 1571-74 (2001) (re nature of the writ); Woolhandler, Ann, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77 (1997), 113 *et seq.*; Woolhandler, Ann, *Patterns of Official Immunity and Accountability*, 37 Case Western L. R. 396 (1987); Jaffe, Louis L., *The Right to Judicial Review*, 71 Harv. L. Rev. 401 (1958).

Patterson, Com'r. v. Gladwin Corp., et al., 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), illustrates petitioners' problem here. In both cases, respondents can sit on administrative claims multiplicity doctrine, licensed by the state judiciary, to preclude effective citizen access to court (and refunds). A restatement of the first Question Presented in this case is simply whether a lecture on piecemeal procedure and administrative law might suffice as due process where 400,000 or so single citizens are implicated. If it will suffice, then citizens can expect far less from the state judiciary in a case of public fundamental rights, than in a private dispute, *inter sese*. *Cf.*, *Reynolds, et al. v. Beneficial National Bank, et al.*, 2002 Westlaw 655931, __ F.3d __ (7th Cir. 2002) (Posner, J.).

The situation here is not similar to the factual circumstances in *Reich v. Collins*, 513 U.S. 106 (1994) (which involved remediation of indeterminate Ys). Georgia's statutory income

tax rates (a matter of X) were not infirm; officials could at least insist on a taxpayer-initiated post-return administrative refund claim before they could know (i) who was a military retiree, and (ii) the amount of federal pension income he sought to exclude or deduct. The case here is likewise not similar to *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), where a California statutory administrative remedy met remedial due process standards, in the discrete case of one contractor embroiled in a specific factual dispute with California labor officials over standards on one job.

In a case involving common claims of known citizens, the insistence on multiplicity can only squelch assertion of the citizens' common chose in action. It will deny any realistic possibility of actual "meaningful" refund relief for all citizens afflicted. It is not "simple and effective." *Cf.*, *Tennessee v. Sneed*, 96 U.S. 69, 24 L. Ed. 610 (1877) (mandamus could be denied to one plaintiff, where statutory refund action would work). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 n.3 (1985); *Dodge v. Woolsey*, 59 U. S. (18 How.) 331,15 L.Ed. 401 (1856) (harking to English equity practice); and *Garrett v. Bamford*, 538 F.2d 63 (3d Cir. 1976), *cert. den.*, 429 U.S. 977 (1976), all indicate a completely different due process tradition where known citizens can be remediated.

All officialdom will seek to engage their state courts in a pedantic test of each taxpayer's standing as a Y, or as a well-behaved and dutiful subject. Yet *Reich v. Collins*, *supra*, is clear enough that a citizen does not have to know a tax is unconstitutional at the time he pays it, and that citizens may not be baited or switched out of "meaningful" refund relief. As to common law rights, *see Arkansas Building & Loan Assn. v. Madden*, 175 U.S. 269 (1899) ("The fact that the defendant is a state official is not in itself a defense. . . .); *Shelton v. Platt*, 139 U.S. 591 (1891) ("multiplicity" changes things); *The City of Chicago v. Dows*, 78 U.S. (11 Wall) 108, 112, 20 L. Ed. 65, 67 (1871):

> ". . . the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the

> officer making the collection, or the body to whom the tax is paid. Here such remedy existed.* * * Nor would he have been compelled to resort to a multiplicity of suits. . . . His entire claim might have been embraced in a single action."

In *Boddie v. Connecticut*, 401 U.S. 371, 377-89 (1971), and *Zablocki v. Redhail*, 434 U.S. 374 (1978), the plaintiffs may not have joined each and every poor person seeking a divorce or all support-delinquent parents seeking a license for re-marriage; the point was that after a judicial holding on the merits, official duty would flow.

Where a statutory tax is collected wholesale, a piecemeal system of retail remedial claims will stultify itself, when all the Ys don't even know the "right tax rates." During the pendency of given single case which challenges an entire statutory rate structure, even if it is publicized, no one else can actually know the "right" rates. Nobody did in Kansas. Taken together, *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (upon settlement by those parties after this court's decision) and *Patterson, Com'r. v. Gladwin Corp., et al.*, 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), also produce the absurdity that no one ten years ago nor anyone today could figure out the "correct franchise tax."

Ab initio, a multiplicitous redress system can only encourage the states to levy and keep tainted money, indefinitely. Yet, that is contrary to due process doctrine of this court, which remediates the citizens. In *County of Lincoln v. Luning*, 133 U.S. 529 (1890), the claimants could not be held to limitations doctrine where redress was directed to a special fund, which was in fact non-existent or inadequate. *See also*, *Beadles v. Smyser*, 209 U.S. 393 (1908) (mandamus not barred where earlier collection steps were impossible; to hold contrary would have stultified prior official acts). *Cf.*, *Stewart Dry Goods Co. v. Lewis (I)*, 287 U.S. 9 (1932) (the General Fund of Kentucky seemed to be insolvent; state statutory remedy not exclusive); *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922) (explicit local

remedy for one corporation was adequately backed by the resources of the state); *Atchison, Topeka & S. F. Ry. Co. v. O'Connor*, 223 U.S. 280, 287 (1912) (plaintiff's constitutional claim was launched against official collector in assumpsit; claim to money was "paramount" to that of the state); *Ward v. Love County (Okla.)*, 253 U.S. 17, 24 (1920) (officials received constitutionally tainted money "for the use and benefit" of multiple claimants); *The City of Chicago v. Dows*, 78 U.S. (11 Wall.) 108, 20 L. Ed. 65 (1871) (relevance of multiplicity).

II. If an Inherent Fundamental Right of Citizens to Be and Remain Single Exists, Antecedent to (or in Tandem with) the Fundamental Right to Marry, Kansas Had No Power to Systematically Surtax All Single People. The Importance of Review Here is to Establish That Equal Protection Lore May Not Be Stretched to Create Such a Power.

A. Griswold's Error

As Dean (and former Solicitor General) Griswold put it: ". . . STATUTES. . . . What are the exact words of the statute? There is no use in thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute." Griswold, Erwin N., *Federal Taxation, Cases and Materials*, Fifth Ed., The Foundation Press, Inc. (Brooklyn, 1960), at p. 15 (footnote omitted). All prior review (and publicity) as to the Kansas regime seems to assume that the Kansas regime merely operated to produce some piddly "disparity" as to a few single persons, just as I.R.C. § 1, 26 U.S.C. § 1, creates some detriments as to some married couples. That is false. *Petitioners do not complain of "differential" graduated income bracketing and decremental results in some cases, in an "equal protection" sense.* The federal lore on the so-called federal marriage penalty is right; but no federal court has confronted anything like the unique rate structure of the Kansas statutes. Kansas invented a brand new system. Likewise, "great thoughts" as to lenient

review in "equal protection" cases do not resolve a surtax on fundamental rights. That is why petitioners' second Question is important.

A consumer sales tax levied at 5% on married purchasers compared to a 6.3% levy on single purchasers might be "different," but would have no constitutional significance, under Kansas style equal protection, per *Peden*. Under due process analysis, it would be a 26% surtax on single people (who have a fundamental right to be and remain so). As to the "burden" of the Kansas surtax regime, petitioners (i) claim that their mathematics are right, and (ii) press the ancient claim that the systematic cumulative bite of the rate structure in K.S.A. § 79-32,110 (1988-1997) was "not close enough for government work." *Associated Industries of Mo. v. Lohman*, 511 U.S. 641 (1994) (Thomas, J.).

B. Lore From the Federal Courts (Griswold's Maxim)

The Constitution grants no federal power to levy a direct systematic financial burden on marriage or upon single people. The First Amendment (as to "free exercise" of religious beliefs as to marriage) and due process protection of fundamental rights (via the secular "liberty interest") would proscribe any such attempt. That is the touchstone of all prior federal courts' examination of I.R.C. § 1, 26 U.S.C. § 1. *Johnson v. United States*, 422 F. Supp. 958 (N.D.Ind. 1976) (*aff'd. sub nom. Barter*, 550 F. 2d 1239 (7th Cir. 1977), *cert. den.*, 434 U.S. 1012 (1978), addresses the so-called federal marriage penalty, and distinguishes the issue presented by the Kansas regime. Since I.R.C. § 1 has never systematically, rate-wise, "penalized" *all* married *or all* single persons, it was easy (and correct) for the district court to hold that both the right to marry and the right of "free exercise of religion" (which are both fundamental and thus joined at the hip) were not systematically burdened. 422 F. Supp. 971, 972, *et seq*. Those taxpayers did not contend (nor could they have contended) that I.R.C. § 1 imposed a direct tax on *all* marriages. 422 F. Supp. at 975.

In *Vivien Kellems*, 58 T.C. 556 (1972), *aff'd. per curiam*, 474 F. 2d 1399 (2d Cir. 1973), *cert. den.*, 414 U.S. 831 (1973), it was obvious that Congress had not intended to regulate, or restrict, or penalize single persons (*qua* single persons)[9]. *Judge Withey's first judicial step was to dismiss that proposition.* 58 T.C. at 558. And that is a boon to our jurisprudence. A federal "singles penalty" existed only in rhetoric. The only way Ms. Kellems could have engineered a 42% singles detriment (under the version of I.R.C. § 1 in effect for the 1965 year at issue) would have been to assume her marriage to a notional man who contributed zero taxable income to the joint enterprise, but supported himself without any money from her. A cipher. If she had married a man who brought his own taxable income to the joint enterprise, in an amount equal to hers, then her share of the joint liability would have been exactly the same as the dollar amount of her actual tax as a single person for 1965. In *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978), *cert. den.*, 439 U.S. 1046 (1978), the court saw that the so-called federal "marriage penalty" is not systematic; it ". . . is suffered not for marrying, but for marrying one in a particular income group." The charts, 576 F.2d at 905, tell the tale. The court published the charts, and did not chant through a series of headnotes. Such would be Griswold's Error.

Here, the rates and mathematics built into the challenged statutory system, see petition for mandamus, ¶ 19, Pet. App. 34a - 36a, tell a completely aberrant tale. Kansas was surtaxing all single people, not graduated income, by levying higher cumulative statutory rates, up and down the line. Single persons were "surtaxed," worse than Christopher Lunding, by operation of the higher statutory percentages levied at the lowest and highest brackets of Kansas taxable income, compared to the rates levied on married persons. The important substantive question is whether Kansas could do it.

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9. The *Peden* court proceeded contrariwise, on the supposition that Kansas might have done that very thing. It chanted out its result in terms of sociological speculation and "lenient" equal protection standards.

C. Burdens on Fundamental Rights

After committing Griswold's Error, one Justice Hodges marshalled many "great thoughts" and wrote a splendid dissent in *Sowders v. Oklahoma Tax Comm.*, 552 P. 2d 698 (Okla. 1976) (at 701):

> "The right to marriage, the right to divorce, and the right to remain single, are basic fundamental human civil rights. The state may not penalize its citizens for making a personal choice concerning their domestic status."

Petitioners contend the same here. The Kansas legislature contrived to make this the right case. Alas, the Oklahoma income tax statute *didn't* systematically penalize all single persons.

When *Peden* was decided on December 20, 1996, it had not occurred to any of the various participants that there is a fundamental liberty interest *inherent in the citizens themselves*, absolute, protected by the First Amendment and the due process clause of the Fourteenth Amendment: to be and remain single, which is a corollary of the right to marry, as a matter of their own choice. *Cf.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Part II, Warren, C. J., discoursing on the fundamental right to marry, or not to marry). Petitioners seek to bring that case. Petition for mandamus, ¶ 11.D, and n.1, Pet. App. 29a - 30a.

Blackstonian notions of secular inherent "freewill" (not mere *relative* rights), which we call "liberty," didn't intrude into the "rational bases" the contenders found (or didn't find) for the levies. Contra, *Blackstone's Commentaries on the Laws of England (1765), Legal Classics Library (Birmingham, 1983), Book One, Ch. I, "The Rights of Persons,"* 119-122. It was "freewill" which inhered in natural persons "as single individuals" which defined liberty for Blackstone. *Ibid.* As of 1791, or during 1868-2002, his equation of "liberty" with "freewill" has not been improved. *State v. Gowdy*, 62 Mont. 119, 203 P. 1115 (Mont. 1922) (striking a $5 head tax on bachelors where heads of families were taxed $2), and the "punitory" effect of the tax on those who did not wish to marry, or couldn't, was likewise unnoticed.

Structurally, family matters are generally left to the states via the Tenth Amendment. *Cf.*, *Bailey v. Drexel Furniture Co.* (the Child Labor Tax Case), 259 U.S. 20 (1922). However, where the states trench too far against fundamental rights of citizens of the United States, the Ist and Fourteenth Amendments operate to vindicate individuals' *own* rights against all government. *Cf.*, *Savings & Loan Assn. v. Topeka*, 87 U.S. (20 Wall.) 655, 22 L.Ed. 455 (1875) (Miller, J.) (no government would have unilateral prerogative to void the marriage of A and B).

Low scrutiny "rational basis" equal protection lore is simply not germane to the fundamental inherent citizens' "liberty" interest asserted here, under due process. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), struck a rational Louisiana tax which could easily have been sustained if the reviewing court made up its mind to forget the First Amendment, and thereupon assumed a state regulation of commercialism in print media. In *Truax v. Raich*, 239 U.S. 33 (1915), if the reviewing court forgot "due process" (as well as the Austrian Treaty) and assumed that the Supreme Good was to protect jobs for native Arizona residents, then the alien disemployment law and penalties were fine. In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), if Chief Justice Marshall forgot the "no state shall" mandate of Article I, Sec. 10 of the Constitution, then the Maryland import tax was sensible.

As Justice Kennedy noted in *Simon & Schuster v. N.Y.S. Crime Victims Bd.*, 502 U.S. 105, 124-128 (1991) (concurring), if a Ist Amendment right is involved (which should be the first analytical step), a "compelling state interest" analysis can wander far beside the point. *See also Republican Party of Minnesota, et al. v. White*, No. 01-521, __ U.S. __ (June 27, 2002) (Kennedy, J., concurring), involving restrictions ". . . beyond the power of government to impose." It is not enough for a reviewing court to arrive at the aperçu that itinerant single monks or roving single troubadours are a different kettle of fish from Mr. and Mrs.

Nelson, and then sustain a statutory 20% surtax on the monk's benefice or the troubadour's tips. As Professor Fuller observed:

> "The drawing of distinctions is certainly not an activity which can be justified as an end in itself. If I were to write a long treatise devoted to developing and maintaining a sharp distinction between the concepts 'pie' and 'cake,' disposing definitively of all the hard borderline cases, like Boston cream pie and upside-down cake, I could scarcely look forward to being congratulated on my contribution to the clarification of a difficult subject."

Fuller, Lon L., *The Law in Quest of Itself*, Beacon Press (Boston, 1966) (rep. 1999, 2000, The Lawbook Exchange, Ltd.), 86. Logical proofs that pie is good would not create police power, ipse dixit, for Kansas to surtax the creation or purchase of wedding cakes. The issue would be about weddings, not pie. *Peden* notwithstanding. *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 38 (1909) (regulatory rights do not include "hostility to rights secured by the supreme law of the land.").

III. The Rejection Below Terminated Petitioners' Constitutional Claims, and Thereby Denied Due Process to Petitioners. Other Doctrine Explained in *Richards v. Jefferson County*, *supra*, and *South Central Bell Tel. Co. v. Alabama*, *supra*, was Ignored, in That the Due Process Implications of Any Affirmative Preclusive Defenses Respondents Might Have Urged Cannot Be Reviewed in this Court, Except by Speculating.

Petitioners cannot banish the thought that Justice Scalia's insight in *Kansas v. Crane*, No. 00-957, __U.S. __ (January 22, 2002), might apply here ("There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try"). "What's the constitution between friends?" has some roots in the Topeka tradition. *State v. Atherton*, 139 Kan. 197, 209-10, 30 P.2d 291, 299 (Kan. 1934).

The action below squelches citizens' own assertion of their federal rights to an adjudication of their claims under the

Fourteenth Amendment. It is directly contrary to the due process tradition explicated in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (Missouri Supreme Court's denial of bill in equity and rejection of federal question raised on motion for rehearing denied due process; taxpayers were not dummies), and in *General Oil Co. v. Crain*, 209 U.S. 211, 226-28 (1908). The only institution petitioners have confronted with the basic question, to actually respond, is the Kansas Department of Revenue ("there is no fundamental right to be single"), as of November 6, 1998. Pet. App. 46a - 47a. All Kansans have a right to hear that from a court.

The termination of the petition below is reminiscent of the shut-down in the Alabama Supreme Court, depicted in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), which those taxpayers challenged (first question) on certiorari. It is clear enough that "due process" mandates both judicial and financial redress. *Newsweek, Inc. v. Florida Dept. Rev.*, 522 U.S. 442 (1998) (Florida was in the habit of telling the federal courts all about state remedies, but was denying "access to refunds" in the Florida system); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (spurious Alabama style res judicata applied against non-parties to prior failed tax challenge); *Reich v. Collins*, 513 U.S. 106, 109-114 (1994) (taxpayers were not dummies; invalid "bait and switch" regime); *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 51 n.35 (1990) (irrelevant that refunds were distasteful to Florida). Petitioners think that Mr. Peden and Ms. Smith are the only persons bound by *Peden. Commissioner v. Sunnen*, 333 U.S. 591 (1948).

Limitations on filing post-return administrative claims (which seek to change particular taxpayer information about Y) are irrelevant. *Cf.*, *Duke v. Turner*, 204 U.S. 623 (1907). Petitioners urged that respondents may not rely on limitations in the face of systematic misrepresentations and denials of due process-mandated remedial rights. Petition for mandamus, ¶¶ 22-26, Pet. App. 38a - 41a; ¶¶ 38 - 42, Pet. App. 46a - 48a. Remediation would be pursuant to constitutional principles, not

local "administrative law." *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 723-5 (1998); *Jackson Co. (Kansas) v. United States*, 100 F. 2d 929 (10th Cir. 1939), *mod.*, 308 U.S. 343, (1939); *Ward v. Love County (Okla.)*, 253 U.S. 17, 22-24 (1920) (neither local law nor payment over to state excused collection of void taxes and denial of state redress); *Atchison, Topeka & S. F. Ry. Co. v. O'Connor*, 223 U.S. 280, 287 (1912) (plaintiff's constitutional claim was "paramount" to that of the state).

But it is anyone's guess why the court below did what it did with any of the federal questions raised by the petition for mandamus.

CONCLUSION

If the court decides to review the federal questions raised here, it could grant certiorari, and at the same time vacate the final judgment below and remand to the Supreme Court of Kansas for further proceedings entailing consideration of both the substantive and the remedial due process claims asserted by petitioners below. *Cf.*, *Newsweek, Inc. v. Florida Dept. Rev.*, 522 U.S. 442 (1998). Alternatively, as in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), and in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), the court could grant the writ as to both Questions Presented, decide those questions itself after briefing and argument, and remand for further proceedings and remediation. Petitioners will have been provided a forum if the court will adopt either course, and pray for relief on this petition by such order as the court shall see fit to make.

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